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[HIGH COURT OF AUSTRALIA.]

MAUGHAN APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXA-
TION } RESPONDENT.

H. C. OF A. *Income Tax (Cth.)—Assessable income—Deduction—Public benevolent institution—Gift to Boys' Brigade—Public control—Income Tax Assessment Act 1936-1940*
1942.
⎵
(No. 27 of 1936—No. 65 of 1940), sec. 78 (1) (a) (ii)*.

SYDNEY,

Nov. 17, 26.

Rich,
McTiernan and
Williams JJ.

An institution which aims at benefiting an appreciable and particularly but not necessarily an appreciable needy section of the community is a public institution. The question whether an institution is subject to some form of public control is a factor to be taken into account in determining whether it is a public institution. But public control is not essential (the main criterion is the extensiveness of the class it is the object of the institution to benefit) and, in order to be of a public nature, the control need not be that of some government body. A constitution which provides for those members of the public who are sufficiently interested in the work of the institution to subscribe to its funds and thereby become annual members and as such eligible to vote at the election of the controlling body creates a control which is public in its nature.

The Boys' Brigade Inc. is financed entirely by public donations, bequests and subscriptions and is governed by a council of fourteen members two of whom retire annually by rotation but are eligible for re-election. On application in writing to the Council, and subject to its approval, every annual subscriber of not less than £5 5s. to the funds becomes an ordinary member (but only for the period of each subscription), and every person who has paid

* Sec. 78 (1) of the *Income Tax Assessment Act* 1936-1940 provides as follows:—“The following shall, to an extent in the aggregate not exceeding the amount of income remaining after deducting from the assessable income all other allowable deductions except the deduction of losses of previous years and of the statutory exemption, be allowable deductions:—(a) Gifts of the

value of one pound and upwards of money or of property other than money which was purchased by the taxpayer within twelve months immediately preceding the making of the gift, made by the taxpayer in the year of income to any of the following funds, authorities or institutions in Australia : — . . . (ii) a public benevolent institution.”

a sum of not less than £21 to the funds becomes a life member. At its buildings, situate in slum areas, the Brigade provides free of charge for the boys of these and surrounding slum areas facilities which more fortunate boys obtain in their own homes. This keeps them off the streets, provides intelligent occupation for their leisure hours, and generally contributes to their physical, mental and moral well-being and improvement. Enrolment is voluntary, and no boy is debarred from enrolling by reason of his race or creed, the locality of his home, or the circumstances of his parents. The boys who enrol are unprivileged and invariably in poor circumstances. On an average between 800 and 900 boys each year avail themselves of the facilities provided by the Brigade.

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Held that the Boys' Brigade Inc. is a "public benevolent institution" within the meaning of sec. 78 (1) (a) (ii) of the *Income Tax Assessment Act* 1936-1940.

CASE STATED.

A case for the opinion of the Full Court of the High Court, stated pursuant to sec. 198 of the *Income Tax Assessment Act* 1936-1942 by *Williams J.*, was substantially as follows:—

1. The appellant claimed that an amount of £3 3s. which was donated by him to the Boys' Brigade Inc. in the year ended 30th June 1940 was a gift to a public benevolent institution in Australia and was therefore an allowable deduction under sec. 78 (1) (a) (ii) of the *Income Tax Assessment Act* 1936-1940 from his assessable income of that year.

2. The Commissioner of Taxation disallowed the claim. An objection by the appellant to this disallowance was duly referred to a Board of Review constituted under the Act. The Board held that the Boys' Brigade Inc. (hereinafter called the Association) was not a public benevolent institution and refused to uphold the objection.

3. At the hearing before the Board the evidence consisted of the oral testimony of Oscar Fordyce Carter who has been the Superintendent and Chief Executive Officer of the Association since 1923 and certain written exhibits consisting of the memorandum and articles of association of the Association and other documents relating to the Association. The Board based its decision upon the facts set out in pars. 4 to 11 hereof.

4. The Association was incorporated in New South Wales in the year 1927 (under the *Companies Act* 1899) to take over and carry on as a going concern an unincorporated association of the same name which was founded in the year 1882. The objects of the Association so far as material are as follows:—(b) To carry on and conduct an institution or institutions in the City of Sydney and/or

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elsewhere in the State of New South Wales or elsewhere in the Commonwealth of Australia for the development as good citizens of the boys of the State or the Commonwealth ; to cultivate Christian manliness ; to promote habits of reverence, loyalty, industry, discipline and self-respect. Nothing herein contained or implied shall limit the class of persons to whom assistance or benefit of any kind may be given by the Association. (c) . . . to provide in the existing buildings of the Association or in any other buildings or erections which may hereafter be acquired, leased or lent to or erected by the Association at Sydney aforesaid and/or elsewhere rooms for the meeting, instruction, amusement, bathing, exercise, reading, writing, social intercourse and general welfare and benefit of the persons referred to in sub-clause *b* of this clause and also to afford to such persons conveniences and facilities for all or any of such purposes and also if deemed convenient to provide convalescent homes and medical and other attention on such terms and conditions as the Association may from time to time prescribe. (f) To provide for the delivery and holding of lectures, entertainments, games, sports, tournaments, meetings, classes, debates and conferences calculated directly or indirectly to benefit the persons using any of the buildings or institutes of the Association or otherwise to advance the interests of the Association and in connection with any such matters to offer, give or contribute prizes, medals, awards and certificates. . . . (g) . . . to accept donations and bequests (whether of real or personal estate) for all or any of the objects of the Association. (h) To collect and receive money by voluntary contribution, collections, subscriptions, donations, legacies, payments by public bodies and others or from the proceeds of entertainments for any of the objects or purposes of the Association.

5. There are no activities of the Association which are within the scope of the object mentioned in the last three lines of sub-clause *c* set forth above.

6. The income and property of the Association must be and are applied solely towards the promotion of its objects and not to any extent by way of dividend or bonus, or otherwise by way of profit, to members (past or present) or persons claiming through them (clause 4). Any surplus upon the dissolution of the Association is required to be given to some other institution or institutions having similar objects and similarly restricted as to disposal of its property (clause 6).

7. The articles of association so far as material are as follows :— For the purpose of registration the number of members is unlimited (clause 2). On application in writing to the Council and subject to

its approval, every annual subscriber of not less than £5 5s. to the funds of the Association becomes an ordinary member (but only for the period of each subscription) (clause 3), and every person who has paid a sum of not less than £21 to the funds of the Association becomes a life member (clause 4).

8. The management of the Association and the control of its property are vested in a Council consisting of a President, a Vice-President (or Vice-Presidents) and not more than twelve members, two of whom retire annually by rotation but are eligible for re-election (clause 7). The Council may exercise all the powers of the Association which are not by the articles or by statute required to be exercised by the Association in general meeting (clause 30).

9. The superintendent, who is appointed and may be removed by the Council, is (under the control of the Council) the chief executive officer of the Association (clause 36).

10. The activities of the Association during the income year 1939-1940 are summarized in the reports distributed to the members and subscribers of the Association which appear over the name of its superintendent in the 58th and 59th yearly reviews of the Association and in the 58th and 59th annual reports of the Association which appear over the names of its chairman and honorary treasurer.

11. The material facts relating to such activities are as follows :—
 (A) The Association is wholly maintained by (or out of the income of funds obtained by) public donations, subscriptions and other voluntary contributions of the kinds specified in sub-clauses *g* and *h* of its objects. It receives no Government subsidy. Its annual income for some years has not been sufficient to meet its expenditure.
 (B) The work of the Association is confined to activities carried on in two buildings—one at Surry Hills and the other at Pyrmont taken over from the unincorporated association. Each building has three floors and was specially designed for the purposes of the Association.
 (C) The facilities of the Association are available to any boy who, upon enrolment, is not less than eight and not more than fourteen years of age. Boys over fourteen are not accepted, but any younger boy who joins a branch may continue to attend the branch for a year or two after the maximum age for joining. Enrolment is simply a card entry of the name, age, address, school and names of parents of the boy concerned. Each attendance is recorded and statistics are compiled. The enrolment of boys using the facilities has for some years been of an average between 800 and 900 boys a year.
 (D) No boy is debarred from enrolling by reason of his race or creed, the locality of his home, or the circumstances of his parents. The boys who enrol are unprivileged and

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invariably in poor circumstances. Boys enrolled at the Surry Hills branch come from Surry Hills, Redfern, Waterloo and, in some cases Paddington; those of the Pyrmont branch come from Pyrmont, Glebe and Ultimo. These districts comprise and contain some of the worst slum areas of Sydney. The houses mostly abut on the streets in which—being the only playgrounds—were it not for the work of the Association the boys would spend their leisure hours. (E) The Association does not canvass boys to join. Common knowledge of the facilities available at the Association's branches attracts the boys to join. The facilities are designed to provide the boys with a wholesome environment, and intelligent occupation for their leisure hours, in substitution for the demoralizing influences of the streets and, even, in some cases, of the boys' homes. (F) Most of the boys who attend are barefooted and poorly clad; many are dirty and suffering from malnutrition. Cleanliness is inculcated and washing facilities, including soap but not towels (the boys are encouraged to bring these with them), are provided for that purpose. There is no sleeping accommodation for the boys in either of the two buildings, and no food is provided except at the Christmas treat and by means of occasional distributions of fruit. Physical defects are not treated except indirectly by way of physical training and recreation and advice. (G) The superintendent has three paid assistants—not all on full time—who supervise and control the boys and allocate them to their classes. One is a skilled instructor in physical training—an army man. The handicraft classes are taken by the assistants and a number of voluntary helpers. (H) Each branch is open from 6.30 to 9 p.m. on all week days and from 7 to 8 p.m. on Sundays. This is supplemented by certain after-school hours—for class work in metal work and carpentry and use of library—on several afternoons of each week and by special occasions. Some boys attend every day; others only occasionally. They are not coerced to attend or to take part in class work, but attendance is encouraged. The boys are allowed to take home any articles they may make in the handicraft classes. (J) First aid is administered and minor injuries treated by the staff, two of whom are qualified to do so. Antiseptics and bandages are supplied to the Association (free of charge) for these purposes. Medical and dental attention is not otherwise provided. In serious cases, however, the Association gets into touch with hospitals, dental institutions, &c., to ensure that sufferers receive adequate treatment—but not at the Association's expense or in its care. (K) Ethical training, collective and individual, is not neglected, but generally the objective rather than

the preceptive method is employed. Boys found stealing or otherwise engaged in objectionable conduct are taken up in the act and made to realize the errors and consequences of their ways. Occasionally boys in the hands or under the notice of the police are, at the request of the latter, enrolled on probation—generally with satisfactory results. (L) Boys who have enrolled when seeking employment are assisted to some extent by the Association. The Association gets into touch with employers for that purpose and knowledge gained in class of the capabilities of boys often enables the Association to place the boys with inquiring employers. (M) Certain interested bodies and persons (principally the Sydney Needlework Guild) have annually for many years supplied the Association with quantities of new clothing (singlets, shirts, trousers, pyjamas, &c.) for distributions in necessitous cases during the winter months. (N) No charge is made for the use by the boys of any of the Association's facilities—including picture shows and instruction in handicraft.

12. On the hearing of the appeal before this Court the parties have agreed that the whole of the material facts are those referred to in pars. 4 to 11 hereof and upon these facts this Court doth state this case in writing for the opinion of the Full Court of the High Court.

The following questions were reserved for the opinion of the Full Court :—

1. Whether on the above facts the Board could in law have reasonably come to the conclusion that the Boys' Brigade Inc. was not a public benevolent institution within the meaning of sec. 78 (1) (a) (ii) of the *Income Tax Assessment Act* 1936-1940.
2. Whether on the above facts it necessarily followed as a matter of law that the Board should have decided that the Boys' Brigade was a public benevolent institution within the meaning of the said sub-section.
3. Whether the decision of the Board was erroneous in point of law.
4. Whether the Boys' Brigade Inc. was in the income year ended 30th June 1940 a "public benevolent institution" within the meaning of the said sub-section.
5. Whether the sum of three pounds three shillings (£3 3s.) donated by the appellant to the Boys' Brigade Inc. in the year ended 30th June 1940 was an allowable deduction from his assessable income of that year.

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Weston K.C. (with him *Kerrigan*), for the appellant. Although the view was expressed in *Perpetual Trustee Co. Ltd. v. Federal Commissioner of Taxation* (1) that the expression “public benevolent institution,” as it appears in sec. 78 (1) (a) (ii) of the *Income Tax Assessment Act* 1936-1940, should be construed as a compound expression, regard should be had to each component part of that expression. The reasoning which led to the majority decision in *The Little Company of Mary (S.A.) Incorporated v. The Commonwealth* (2) is in the main irrelevant upon a consideration of the question what is a public benevolent institution within the meaning of sec. 78 (1) (a) (ii). The Boys’ Brigade is directed to the making of good citizens, the material being boys who are unfortunately circumstanced and who excite pity and compassion. It helps and assists boys who are unprivileged, in necessitous circumstances, bereft of resources in the ordinary sense and who, for the most part, reside in areas and homes where the environment is unsatisfactory and prejudicial to the formation of good character and the making of good citizens. Thus the Boys’ Brigade must be regarded as a public benevolent institution. It is submitted that despite contrary opinions expressed in *Public Trustee (N.S.W.) v. Federal Commissioner of Taxation* (3) and *The Little Company of Mary (S.A.) Incorporated v. The Commonwealth* (4), it is not necessary that a hospital in order to be a “public” hospital should be controlled by the government or some other public authority.

[WILLIAMS J. referred to *Public Trustee v. Hospitals Commissioner of New South Wales* (5).]

Hardwick K.C. (with him *E. J. Hooke*), for the respondent. The objects and activities of the Boys’ Brigade show that it is not a public benevolent institution. In reality it is a poor-boys’ club. Its activities are philanthropic, social, physical and educational. The Brigade is not organized for the relief of poverty, sickness, destitution or helplessness (*Perpetual Trustee Co. Ltd. v. Federal Commissioner of Taxation* (6)). The facts do not show that any of the boys are destitute. The meaning of “public” was discussed in *Verge v. Somerville* (7). There is a distinction between “benevolent” and “benignant” (*Perpetual Trustee Co. Ltd. v. Federal Commissioner of Taxation* (8)).

Cur. adv. vult.

(1) (1931) 45 C.L.R. 224.

(2) *Ante*, p. 368.

(3) (1934) 51 C.L.R. 75, at p. 100.

(4) *Ante*, p. 368.

(5) (1939) 56 W.N. (N.S.W.) 198.

(6) (1931) 45 C.L.R., at p. 232.

(7) (1924) A.C. 496, at p. 499.

(8) (1931) 45 C.L.R., at p. 233.

The following written judgments were delivered :—

RICH J. I have read the judgment of my brother *Williams* and agree with it.

MCTIERNAN J. This case was stated by my brother *Williams* for the decision of the question whether a deduction should be allowed from the assessable income of the appellant of a gift which he made to an institution known as the Boys' Brigade Inc. on the ground that the gift was to a public benevolent institution within the meaning of sec. 78 (1) (a) (ii) of the *Income Tax Assessment Act* 1936-1940. I have read the reasons for judgment which his Honour has since prepared for the decision of the case and agree with them, and shall add but little.

The case is stated in an appeal to the Court from a decision of the Board of Review. A decision of the Board is not appealable unless it involves a question of law, and the form of the substantial question to be decided is determined by this limitation. It is in substance whether it was open to the Board, applying the right *criteria*, to conclude that the Boys' Brigade Inc. was not a public benevolent institution within the above-mentioned provision of the Act. The expression "public benevolent institution" is not a term of art. Its meaning may be governed by the context in which it is found. There is nothing to indicate that the expression in sec. 78 (1) (a) (ii) has any other meaning than its ordinary meaning. The Court considered the meaning of the expression "benevolent institution" in *Perpetual Trustee Co. Ltd. v. Federal Commissioner of Taxation* (1), and applied the *criteria* laid down there in a subsequent case, *Public Trustee (N.S.W.) v. Federal Commissioner of Taxation* (2). It decided in the former case that the common understanding of the words "benevolent institution", when used together, is a body organized for the relief of poverty or distress. In the present case the argument centres on the question whether the Boys' Brigade Inc. is organized for the relief of poverty. Poverty is a relative condition. It is I think hardly open on the facts of the case to draw any other inference than that the charity of those who maintain the Boys' Brigade Inc. is excited by social conditions arising from poverty and that the dominant object of the institution is to elevate boys adversely affected by those conditions. It is not probable that many of the boys for whose welfare this institution exists could overcome those conditions without its aid. The institution is not incapable of being properly described as a public benevolent institution because it is not owned or controlled by the Government. It would be contrary to a considerable volume

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(1) (1931) 45 C.L.R. 224.

(2) (1934) 51 C.L.R. 75.

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of judicial authority to say that such is the only test whether an institution is public. An individual may render public service although he is not a public official or controlled by the Government. The premises and the facilities of this institution and its services are provided for an extensive class, and by reason of the measure of its public service and the conditions under which it is given, I agree it is not open, on the facts of the case, to say it is not a public benevolent institution.

The questions should be answered: 1. No. 2. Yes. 3. Yes. 4. Yes. 5. Yes.

WILLIAMS J. During the year ended 30th June 1940, the appellant gave £3 3s. to the Boys' Brigade Inc. In his income-tax return, he claimed this sum as an allowable deduction under sec. 78 (1) (a) (ii) of the *Income Tax Assessment Act* 1936-1940, on the ground that it was a gift to a public benevolent institution within the meaning of that sub-section. The Commissioner having disallowed the deduction the appellant appealed to the Board of Review, which dismissed the appeal. The appellant has now appealed to this Court. On this appeal coming on for hearing before me I stated a case for the opinion of the Full Court pursuant to sec. 198 of the above Act, the principal questions being whether on the facts the Board could in law have reasonably come to the conclusion that the Brigade was not a public benevolent institution within the meaning of the sub-section, and whether it necessarily followed as a matter of law that the Board should have decided that the Brigade was such an institution. The facts upon which the Board reached its conclusion are set out in pars. 4 to 11 of the case stated and need not be repeated in detail. The Brigade (which I shall call the Association to accord with the nomenclature in the case stated) was incorporated in 1927 under the *Companies Act* 1899 (N.S.W.) to take over and carry on as a going concern an unincorporated association of the same name which was founded in the year 1882. The Association, which is financed entirely by public donations, bequests and subscriptions, is governed by a Council consisting of a president, vice-presidents and not more than twelve members, two of whom retire annually by rotation but are eligible for re-election. On application in writing to the Council, and subject to its approval, every annual subscriber of not less than £5 5s. to the funds of the Association becomes an ordinary member (but only for the period of each subscription), and every person who has paid a sum of not less than £21 to the funds of the Association becomes a life member.

The question whether an institution is subject to some form of public control is a factor to be taken into account in determining whether it is a public institution (*The Little Company of Mary (S.A.) Incorporated v. The Commonwealth* (1)). But public control is not essential (the main criterion is the extensiveness of the class it is the object of the institution to benefit) and, in order to be of a public nature, the control need not be, in my opinion, that of some government body. A constitution which provides for those members of the public who are sufficiently interested in the work of the institution to subscribe to its funds and thereby become annual members and as such eligible to vote at the election of the controlling body creates a control which is public in its nature. It is the sort of control that one could expect to find for an institution which carries on activities calculated to arouse the interest of a considerable number of well-disposed citizens with a liberal and progressive outlook, to cause them to subscribe to its funds and to take an interest in its management and work. Similar provisions are contained in Part V. of the *Public Hospitals Act* 1929-1940 (N.S.W.).

The headquarters of the Association are located in two buildings situated one in Surry Hills and the other in Pyrmont, both of which are slum areas. There it provides free of charge facilities for the boys of these poor districts which their more fortunate brothers obtain in their own homes. This keeps them off the streets, provides intelligent occupation for their leisure hours, and generally contributes to their physical, mental and moral well-being and improvement. As enrolment is voluntary, the fact that on an average between 800 and 900 boys a year avail themselves of these facilities proves that the Association caters for a real want. In *Perpetual Trustee Co. Ltd. v. Federal Commissioner of Taxation* (2) this Court held that the collocation of words "public benevolent institution" connotes the relief of poverty, suffering, distress or misfortune. Some time after that decision, which related to the same expression in the *Estate Duty Assessment Act* 1914-1928, sec. 8 (5), the Commonwealth Parliament amended the *Income Tax Assessment Act* 1936-1939 by adding to the Act as an allowable deduction under sec. 78 gifts to a public institution or fund established and maintained for the comfort, recreation or welfare of the members of the Naval, Military or Air Forces of the Commonwealth. This amendment is significant as showing that the Parliament evidently intended the word "public" to include institutions which, like the Royal Naval House, provide for the needs of some special but substantial

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(1) *Ante*, p. 368.

(2) (1931) 45 C.L.R. 224.

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class of the community. But this is merely a recognition of the view established by many decisions (see the cases collected in the judgment of *Rich J.* in *The Little Company of Mary Case* (1)) that an institution which aims at benefiting an appreciable and particularly but not necessarily an appreciable needy section of the community is a public institution.

To sum up, the sources of the Association's finances are public benevolence, it is controlled by an executive elected upon a quasi-public basis, and its activities, which accord with and fulfil the main objects in the memorandum of association, are of a public benevolent nature. It complies with the following definition of an institution contained in the speech of Lord *Macnaghten* in *Mayor &c. of Manchester v. McAdam* (2): "It is the body (so to speak) called into existence to translate the purpose as conceived in the mind of the founders into a living and active principle. Sometimes the word is used to denote merely the local habitation or the headquarters of the institution. Sometimes it comprehends everything that goes to make up the institution—everything belonging to the undertaking in connection with the purpose which informs and animates the whole": See also *Minister of National Revenue v. Trusts and Guarantee Co. Ltd.* (3).

The only conclusion, in my opinion, which was reasonably open to the Board on the evidence was that the Association was in the year of income a public benevolent institution. The questions should therefore be answered as follows:—1. No. 2. Yes. 3. Yes. 4. Yes. 5. Yes. The parties have agreed there should be no order as to costs.

Questions in the case stated answered as follows :

—1. No. 2. Yes. 3. Yes. 4. Yes. 5. Yes. No order as to costs of the case stated pursuant to the agreement of the parties. Case remitted to *Williams J.*

Solicitors for the appellant, *Stephen, Jaques & Stephen.*

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.

(1) *Ante*, p. 368.

(2) (1896) A.C. 500, at pp. 511, 512.

(3) (1940) A.C. 138, at pp. 149, 150.